No. 3964

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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ADELAIDE McCOLGAN, as administratrix with the will annexed of the estate of Daniel A. McColgan, and R. McCOLGAN,

*Appellants,*

vs.

FREDERICK V. LINEKER, et al.,

*Appellees.*

## ORAL ARGUMENT OF ALFRED J. HARWOOD IN REPLY TO BRIEF OF FREDERICK V. LINEKER, APPELLEE.

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Mr. HARWOOD: I shall now reply to certain contentions made in the brief of the appellee. Most of the contentions there made were anticipated in my opening brief, but there are a few statements made in the brief to which I would like to reply.

At page 3 of appellees' brief the following statement is made:

> "The remarks objected to, we believe, are mere expressions of opinion concerning another case which had nothing to do with the merits of the present case whatsoever."

It will be sufficient in answer to this contention to quote the following excerpts from the affidavits filed by these appellants, where it is averred that Judge Van Fleet made the following statements:

> The Court. Now then, I am only suggesting this, of course, in a tentative way, because I am fully satisfied myself that this defense is not well taken, and I will be perfectly frank to say, because I have become so familiar with the facts underlying this whole transaction with reference to this woman's property, that it is a stench in the nostrils of any honest man, the manner in which this woman's property was taken from her originally. It was little less than downright robbery. And I have stated it before in the presence of those who are responsible, and I again insist upon it, that the evidence that they may have given in the past in courts of justice under certain circumstances, does not change my attitude at all, because in the case of Mrs. Lineker, against Dillon and in the subsequent contempt proceedings the entire facts of this entire transaction were developed to me in such a way as to leave no room for doubt as to the conclusion which should be based upon them; and therefore, I desire if possible to reach the merits of this controversy. The character in which that occurred was brought out, was well illustrated, well evidenced upon the stand by one of the McColgans—I don't know whether it is the one that is still alive or the one that is dead—where he voluntarily made the suggestion that he felt—I don't remember exactly how he expressed it—but undoubtedly it was on his conscience that he had felt that perhaps there was something coming to Mrs. Lineker and that he had had that in mind to come to a settlement with her, although he said he had not.

> Mr. TAUGHER. Yes, your Honor—offered settlement with her for several thousand dollars.
>
> The COURT. Yes, I have forgotten. But underlying that declaration, which was forced from him undoubtedly by his conscience, was this history of a state of facts that should make any honest man blush. Therefore I say that if I can get away from this technical objection—technical in the sense that it does not involve the merits—I shall do so.

At page 4 of their brief counsel for the appellee quote from the decision of the Kansas Supreme Court in the case of *Emporia v. Vollmer,* 12 Kans. 627, where the Court said:

> "a reviewing court will sustain an overruling of the application on the ground that the judge must have been personally conscious of the falsity or non-existence of the grounds alleged. It is not sufficient that a *prima facie* case only be shown, such a case as would require the sustaining of a challenge to a juror."

Counsel must know that this case is not authority under Section 21 of the Judicial Code. This case was referred to in my brief at page 38, where I pointed out that it had no application at all under Section 21 of the Judicial Code, as construed by the Supreme Court in *Berger v. U. S.,* 255 U. S. 32. Under Section 21 of the Judicial Code we are not at all concerned with what the judge might be "personally conscious" of. And under Section 21 is it necessary only that the affidavit shall

> "*give fair support to the charge of a bent of mind that may prevent or impede impartiality*

> *of judgment.".* (Opinion of Mr. Justice McKenna in the *Berger* case.)

At page 6 of their brief counsel cite the case of *Ex parte Fairbanks,* 194 Fed. 978 (D. C.). This case is also referred to in my brief at page 36. In the case cited the district judge in a letter to the circuit judge mildly criticized one of the attorneys of the Fairbanks Company for complaining to the circuit judge that the trial of the case had been delayed. Referring to this letter, the District Court in its opinion said:

> "No reference whatever was made to the merits of the litigation, or preference expressed between the parties, or intimation of any kind given either as to the law or the facts of the case." (Page 991.)

There is nothing in *Ex parte Fairbanks* which supports the ruling of Judge Van Fleet in the case at bar. Moreover, as pointed out in my brief at page 38 the case of *Ex parte Fairbanks* has been overruled by the United States Supreme Court on nearly every point decided.

Counsel say these defendants should have excepted to the statements made by Judge Van Fleet on January 24th. Such is not the proper occasion for an exception. "Exception" is defined by *Bouvier* as

> "Objections made to the decision of the Court in the course of a trial."

These statements made by Judge Van Fleet were not decisions and had nothing whatever to do with

the pleas of *res judicata* which had been submitted to him for his decision. That this was no place for taking an exception is shown by the very case of *Denver v. Home Savings Bank,* 200 Fed. 28, cited by counsel at page 10 of their brief.

With reference to the contention that the affidavits were not filed in time counsel say that appellees

> "could not know what the appellants were doing during the forty or more days following the submission of the pleas of *res judicata.*"

The cause shown for the delay in the filing of these affidavits is very complete. It is set out in full at pages 44 and 45 of my brief. *Every averment made is an averment of a fact—not one of these facts were denied by the affidavit filed by the plaintiff.* It is alleged in the affidavits that the stenographic reporter who took down the statements of the judge was regularly employed by the railroad commission and that after January 24th he was at Eureka and other places in California acting as stenographic reporter for the railroad commission. It is further averred that

> "Alfred J. Harwood, appellants' counsel, made diligent effort to communicate with said W. L. Flannery and on several occasions called at the office of the railroad commission to see said W. L. Flannery so that he could request said W. L. Flannery to transcribe his notes, but that appellant's said counsel was unable to make such request of said W. L. Flannery for the reason that said W. L. Flannery was at Eureka and other places in the State of California."

It is further averred that affiants' said counsel used reasonable diligence in obtaining a transcript of the notes of said W. L. Flannery made on the 24th day of January, 1922.

No attempt is made to deny any of these allegations.

As pointed out in my brief, Judge Van Fleet on January 24th continued the trial of the case indefinitely. The continuance was not to any definite day or term. These facts are shown by the affidavits.

I respectfully submit that a sufficient showing was made, and that if any of the facts averred were not true the plaintiff could have denied them. And if the plaintiff had no information or belief upon the subject he could likewise have denied them on that ground.

The continuance of the case to no certain date or term of the Court, in itself, would be a sufficient *prima facie* showing to justify the filing of the affidavits at the time they were filed.

In this connection it may be noted that the judge did not rule on the motions to disqualify until August 21, 1922, which was over five months after the affidavits were filed. (Tr. p. 181.)

Counsel refer to the statement of the judge that he felt he would have to sustain the pleas of *res judicata* and say that this statement indicates the alleged impartiality of the judge. The other statements of the judge show that he is strongly partial

and that his mind is not indifferent as between the parties. The mere fact that he felt that as a matter of law he would have to sustain the pleas of *res judicata* is immaterial. He also said he hoped he could see his way clear to overrule them. The statement of the judge that he felt he would have to sustain the pleas and the further statement that he hoped he could see his way clear to overrule them, clearly show, in themselves (and wholly independent of the other stronger statements), that the judge is not impartial.

In passing it may be noted that the judge's hope that he could see his way clear to overrule the pleas of *res judicata* was in fact realized.

As pointed out at page 56 of my brief, the filing of an affidavit which shows bias and prejudice on the part of the judge precludes the judge from performing any act other than ruling on the legal sufficiency of the affidavit and (if the affidavit is not filed within ten days prior to the beginning of the term) ruling on the sufficiency of the cause shown for the delay in filing. In my opinion, if the cause shown is *prima facie* sufficient the section requires the judge to designate another judge. Prejudice being shown, it was not competent for the judge to pass on any disputed question of fact involved in the showing. As said by the Supreme Court in the *Berger* case:

> "At any rate, we can only deal with it as it is expressed, and enforce it according to its expressions. Nor is it our function to approve or

> disapprove it; but we may say that its solicitude is that the tribunals of the country shall not only be impartial in the controversies submitted to them, but shall give assurance that they are impartial,—free, to use the words of the section, from any 'bias or prejudice' that might disturb the normal course of impartial judgment. *And to accomplish this end the section withdraws from the presiding judge a decision upon the truth of the matters alleged.*"

In this case none of the averments made in the showing were denied by the counter-affidavit filed on behalf of the plaintiff, so no question arises as to the power of the judge to pass on controverted question of fact with relation to the showing. But the section must also be construed, when a *prima facie* showing is made, as precluding the judge from denying the application to designate another judge.

Let us assume that the showing made is such that different judges might arrive at different conclusions as to its sufficiency. If the showing is of this character then it must be held that it is sufficient and that the judge is obliged to designate another judge. If the section were otherwise construed and any discretion were vested in the judge, the very evil which the statute was intended to remedy would still exist. In such a case the judge who was biased and prejudiced might be thereby influenced in passing on the sufficiency of the showing made.

At page 57 of my brief I referred to the fact that in the opinion, filed at the time the judge denied the motions to designate another judge, certain

statements are made which are wholly outside of the record. In this brief counsel make no reference to this matter but quote in full the opinion of the judge. In view of the fact that his opinion is quoted at length by counsel, I shall briefly refer to the particulars wherein the statements of fact are not supported by the record.

The judge states in his opinion that in 1919 during the trial of the case of *Lineker v. Dillon* he

> "first gave voice to expressions substantially similar to those complained of here—both of the McColgans being in court at the time."

The judge in his opinion also made the following statement:

> "Here the substantive evidence of the claimed bias and prejudice had been presented to the complaining defendants as early as the trial of *Lineker v. Dillon* in 1919."

The judge made these statements in support of his conclusion that the affidavits should have been filed within ten days before the beginning of the term. The statements above quoted are wholly unsupported by the record.

Moreover, as pointed out at page 59 of my brief, it is impossible that the facts showing bias and prejudice alleged in the affidavits could have existed in 1919. Even if Judge Van Fleet had harshly criticized these defendants in 1919, such criticism could not, in the nature of things, have been coupled with the statements quoted in these affidavits show-

ing that the prejudice of the judge was so strong that the judgments rendered in favor of the defendants in the state courts "did not change his attitude at all" and that he hoped to be able to see his way clear to overrule the pleas of *res judicata.*

In his opinion the judge also states that he

> "was not aware of any sentiment or feeling that would preclude him from giving a fair and impartial trial to the issues involved in this cause as to all of the defendants."

Even if the judge had filed an affidavit to that effect (and he did not), such affidavit would be wholly immaterial under the decision of the Supreme Court in the *Berger* case.

Counsel say that Judge Van Fleet merely indicated the impression made upon his mind as a judge by certain evidence given in the *Dillon* case, and that any opinion formed or conclusion reached were formed and reached in the exercise of his judicial functions.

In reply I will say that if a judge harshly criticizes a witness in a cause, charging him with dishonesty and fraud, and this witness subsequently is a party to an action before such judge, that he can file an affidavit showing bias and prejudice and that the affidavit will be sufficient.

In the *Berger* case the judge, Landis, made statements which showed prejudice against the class of which the defendants impleaded with Berger were members. These statements, equally with the state-

ments here in question, may be said to have been made "in the exercise of the judicial functions" of the judge. In the case where Judge Landis made the statements he had formed the opinion that German-Americans were disloyal and so expressed himself. In the case at bar Judge Van Fleet in the *Dillon* case formed the opinion that the McColgans had acted dishonestly and fraudulently. The *Berger* case is in principle the same as the case at bar, the only difference being that in the *Berger* case the statements made by the judge merely indicated prejudice against a class, whereas in the case at bar the statements show prejudice against these very defendants.

Judge Van Fleet in his opinion says that

> "personal prejudice and bias cannot be said to arise from views formed in the mind of the judge founded upon sworn testimony in a cause, and if it were otherwise no judge would be qualified to re-try a cause where for any reason the judgment first entered had to be set aside and the cause re-heard."

As I have pointed out in the brief, there is a well recognized distinction between statements made by a judge after hearing the evidence and statements made before he has heard the evidence. If at the conclusion of a trial and after a verdict of guilty the judge should say that he believes the defendant guilty, that statement would not show prejudice; but if the judge should make such a statement before the trial commenced it would show prejudice. Judge Van Fleet in his opinion fails to differentiate

between a case where the statement is made after hearing the evidence and when it is made in advance of hearing the evidence.

If when a judge starts to try a case there is no inclination toward either side but after having heard the evidence there is an inclination toward one side or the other, such inclination is not "prejudice"—the very meaning of the word itself shows that it is not. But if that inclination exists before the judge has heard the case then the judge is prejudiced.

Counsel say that the statements of Judge Van Fleet "constitute an expression of *judicial* opinion as contradistinguished from a *personal* opinion." The statute says that if the judge "has a personal bias or prejudice either against the defendant or in favor of, any opposite part to the suit" he is disqualified. *It is the attitude of mind of the judge to which the statute refers.* If that attitude is not impartial the judge is disqualified and it matters not whether the attitude is the result of what the judge has heard in a case to which the affiant was not a party or is the result of some contact with the affiant which the judge may have had wholly outside of his office of judge. The statute makes no such distinction and when the affiant avers that he believes the judge is biased or prejudiced and bases his affidavit on "fairly adequate facts and circumstances" another judge should be designated.

Obviously the prejudice and bias shown by the affidavits is personal against these defendants and in favor of the plaintiff Norvena Lineker.

The judge has stated in effect that the defendants are dishonest and that they defrauded the plaintiff Norvena Lineker. The judge also stated that the plaintiff's rights have been butchered.

It is immaterial how the judge acquired the information which has caused this prejudice and bias to exist. Of course if this case had been tried by the judge and he had so expressed himself after hearing the evidence, that fact would not entitle these defendants to have another judge called if a new trial were granted. But that is not this case.

The Supreme Court in the *Berger* case said the reasons and facts stated in the affidavit

> "must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment."

It would be putting it too mildly to say that the affidavits here filed show a "bent of mind that may prevent or impede impartiality of judgment." The reasons and facts on which the charge of bias and prejudice is made in this case show that impartiality of judgment on the part of Judge Van Fleet is impossible.